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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

JOHN W. MARTIN, ET AL., PETITIONERS

v.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 requires a showing of job-relatedness for employment tests which have a substantial disparate racial impact and which are used to select applicants

in rank order for admission into training programs and eventual employment.

2. Whether Title VII prohibits the use of employment tests which have a substantial disparate racial impact, only a small statistical relationship to a job-related criterion, and no operational utility or practical significance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
a. Academy performance	4
b. Experimental ratings	5
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405	10, 13
Blake v. *City of Los Angeles*, 595 F.2d 1367, cert. denied, No. 79-54 (Apr. 28, 1980)	10
Comstock v. *Group of Institutional Investors*, 335 U.S. 211	10
Davis v. *Washington*, 348 F. Supp. 15	11
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86	13
FIRE v. *City of St. Louis*, 616 F.2d 350, petition for cert. pending, No. 80-29	13
Griggs v. *Duke Power Co.*, 401 U.S. 424	10
Guardians Association of the New York City Police Dep't, Inc. v. *Civil Service Commission*, No. 79-7377 (2d Cir. July 25, 1980)	10, 12
Washington v. *Davis*, 426 U.S. 229	3, 7, 10, 11

Constitution, statutes and regulations:

United States Constitution, Fourteenth Amendment (Equal Protection Clause)	3
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e	3, 8
Section 713(b), 42 U.S.C. 2000e-12(b)	8, 15

Constitution, statutes and regulations—Continued Page

Department of Justice Guidelines on Employee Selection Procedures, Section 12b(5), 28 C.F.R. 50.14 (1978) 6, 13

EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. (1970):

Section 1607.9 ..... 9, 15

Section 1607.14B(6) 13

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-27) is reported at 616 F.2d 812. The opinion (Pet. App. A-28 to A-63) and order (Pet. App. A-64 to A-65) of the district court are reported at 13 Empl. Prac. Dec. ¶ 11,504.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1980. A petition for rehearing was denied on June 16, 1980 (Pet. App. A-2). The petition for a writ of certiorari was filed on September 13, 1980. The cross-petition was filed on October 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Personnel Board of Jefferson County has administered employment tests for positions with local government agencies since 1945 (Pet. App. A-28). At issue in this case [1] are two of those tests, Police

[1] This action is a consolidation of four suits brought by the United States and three sets of private parties. (1) The United States' suit was filed on May 27, 1975, against petitioner Personnel Board, Jefferson County, the County Department of Public Health, and 12 cities within the county (Pet. App. A-5 & n.2); (2) on January 4, 1974, the Ensley Branch of the National Association for the Advancement of Colored People and certain individuals filed a class action against the petitioner Board and its Director and the Mayor and City of Birmingham, Alabama (*ibid.*); (3) on January 7, 1974, John W. Martin and other individuals (petitioners in No. 80-614) filed suit against the petitioner Board, Jefferson County, and the City of Birmingham (*ibid.*); (4) on February 20, 1976, Lucy Walker and others filed suit against the

Test 10-C, which has been used since August 18, 1967, and Firefighter Test 20-B, used since October 23, 1968 (*id.* at A-29).

Each test consists of 120 multiple choice questions (Pet. App. A-8).[2] A substantial number of questions on both tests examine primarily for mathematical and verbal ability (*id.* at A-8 n.9). Job applicants who received passing scores were ranked on eligibility lists in order of their scores (*ibid.*). When job openings occurred, the top three candidates on the list were certified to the appropriate hiring department for a final selection (*ibid.*). Once selected, applicants were required to complete a fire or police academy training program before being hired, although, as a practical matter, applicants rarely failed to achieve passing grades in the training program.[3]

Both the firefighter and police tests have had an adverse impact on black applicants. Between March 24, 1972 (the effective date of Title VII for petitioner) and trial, administration of the tests had the following results (*id.* at A-32):

	10-C		20-B	
	Black	White	Black	White
Failing Test	395	191	216	267
Passing Test	373	1,762	69	1,263
Hired	51	455	9	215

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petitioner Board and the Jefferson County Nursing Home (*id.* at A-5 to A-6) (the police and firefighter tests were not challenged in the Walker suit).

[2] Only 80 of the 120 questions have been used to grade the 10-C test since April 10, 1974 (*id.* at A-8 n.9).

[3] Since 1962, only 11 of 733 cadets have failed the police academy; none has failed the firefighter academy (*id.* at A-45 to A-46).

2. Trial was held in December 1976, limited primarily to the question whether the 10-C and 20-B tests discriminated against black applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.[4] Petitioner Personnel Board attempted to demonstrate the job-relatedness of the police and firefighter tests by criterion validation studies (Pet. App. A-33 to A-41).[5] The validation studies involved measuring test scores of persons already hired against three criteria: (1) employee efficiency ratings, which are periodic evaluations by superiors of an individual's job performance; (2) grades received in academy training; and (3) experimental ratings developed especially for the validation study to rate job-related personality characteristics, knowledge, and abilities (*id.* at A-38 to A-40). The Personnel Board's own expert witnesses acknowledged, however, that the first of these criteria, efficiency ratings, were "not trustworthy assessments of the employees' actual performance" (*id.* at A-39). Accordingly, the district court rejected these ratings, and considered only the other two.

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[4] A sex discrimination challenge to the firefighter and police tests and a challenge against an office-worker test were dropped. All other issues were reserved (Pet. App. A-6 n.3). The trial also concerned whether the tests violated the Equal Protection Clause of the Fourteenth Amendment; the district court concluded that use of the tests did not violate the Fourteenth Amendment since "there has been no design or intent on the part of the Board to discriminate on the basis of race or color" (*id.* at A-31).

[5] Criterion validation is one of three recognized procedures for validating employment tests. *Washington* v. *Davis*, 426 U.S. 229, 247 n.13 (1976). "Criterion" or "empirical" validity is "demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified" (*ibid.*).

a. Academy Performance

With respect to academy grades as a criterion, the district court stated that "[w]here, as here, new employees are required to complete special training before performing their duties, successful completion of that training may properly be used as a criterion-measure, if, that is, the training is intended to, and does, provide skills or knowledge needed for performance of the job" (Pet. App. A-38). The court concluded that the two schools here "do serve that purpose and function" (*ibid.*). But the district court found that neither the 10-C nor the 20-B test validly predicted successful *completion* of the required training courses (*id.* at A-45). Indeed, the court found that even persons scoring zero on the 10-C and 20-B tests could be predicted to achieve passing academy grades (*id.* at A-46).

Although test scores were shown to have a statistically significant relationship to academy grades, the district court held that relative standing or ranking among students who successfully complete the training program was not a proper validating criterion absent a showing that relative rankings or standings are, in turn, "appropriate predictors of job performance" (Pet. App. A-38). The court expressed two concerns that cautioned against accepting academy ranking as a relevant criterion: (1) because academy grades have no impact on job opportunities after completion of the training program, they are "likely to be influenced by motivational considerations not present in actual job performance"; and (2) the "emphasis in the academies on paper-and-pencil multiple choice items, while providing objectivity, may also reflect a relationship to the paper-and-pencil

screening exam not found in job performance" (*id.* at A-39). The district court found that while test scores correlated with academy grades, the correlations between academy grades and subsequent job performance were, for the most part, not significant (*id.* at A-45). And where significant correlations *were* found, the findings were mixed—some were positive, but others were, in fact, negative (*id.* at A-45). A negative correlation, of course, indicates that the higher the academy grades, the *lower* the performance ratings.

b. Experimental ratings

Experimental ratings were deemed to be an appropriate criterion measure, although the district court found them limited in their usefulness because of "lack of evidence as to reliability and the lack of special steps to detect or control possible bias" (Pet. App. A-40). In the present case, the studies relating to experimental ratings and the 20-B test were found to have produced inconclusive results. Thus, while there was a positive correlation between test scores and job performance of firefighters on the job less than three years, there was a negative correlation between 20-B test scores and job performance of firefighters with more than three years experience—"suggesting that over time the lower scoring applicants made the better employees" (*id.* at A-46 to A-47). Thus, the court concluded, "[a]bsent any indication that during the first few years the lower scoring applicants had been inadequate on the job, one is hard pressed to conclude that the higher scoring 20-B applicants are in fact the better persons to hire" (*id.* at A-47).

With respect to the 10-C test, the court, after undertaking a number of statistical analyses, reached

the conclusion that although the test had a statistically significant positive relationship to the experimental ratings, "albeit of very low magnitude" (Pet. App. A-53), the test had only marginal utility as a selection device for improving police officer performances (*id.* at A-47 to A-53). The court also included in its analysis several practical considerations: (1) the nature of the job and the consequences of a faulty hiring decision (*i.e.*, that the occasional selection of an inept police officer would not present the same type of daily economic and human risk factor as would, for example, the employment of inept airline pilots or busdrivers) (*id.* at A-53); (2) the fact that new police employees must undergo a 12-month probationary period during which incompetents could be weeded out (*id.* at A-54); (3) the fact that this test did not address the more critical need of police forces to screen out the emotionally unfit (*ibid.*); and (4) the substantial adverse racial impact of the test (*id.* at A-54 to A-55).[6] Finally, the district court concluded that the benefits of the 10-C test were so "minimal" that "no-test-at-all has 'substantially' the same practical validity as the 10-C" (*id.* at A-54).

Based on its conclusion that the 10-C and 20-B tests had an adverse impact on black applicants and had not been shown to be job-related, the court found that they violated Title VII. The district court concluded that petitioner's liability for the use of the 10-C and 20-B tests commenced on April 25, 1975, and July 8, 1976, respectively, the dates on which

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[6] The court relied on Section 12b(5) of the Department of Justice Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14 (1978) (Pet. App. A-52), which provides that the degree of adverse impact should be considered in determining whether a selection procedure is appropriate.

petitioner received the validation study results and "should have * * * concluded that provisional use of the tests was no longer permissible" (Pet. App. A-56).

3. Petitioner Personnel Board appealed from the ruling that the tests violated Title VII. The United States and the Martin plaintiffs cross-appealed on the question of the dates for commencement of liability.[7] The court of appeals affirmed the district court's holding that the 10-C and 20-B tests violated Title VII but remanded for additional findings on the question of when liability commenced.

Applying the "clearly erroneous" standard, the court of appeals affirmed the district court's findings that the tests were not shown to be properly validated as predictive of job performance (Pet. App. A-13). The court of appeals rejected petitioner's argument that the tests were properly validated under Title VII because test scores correlated positively with training academy grades (*id.* at A-14). The court distinguished *Washington* v. *Davis*, 426 U.S. 229 (1976), where this Court held that an employment test was properly validated because it was shown to predict that those tested had the minimum reading and verbal skills necessary to complete a job-relevant training program (Pet. App. A-15 to A-16). Here, by contrast, the court found that the tests were not used to test *minimum* skills, "but rather were used to rank job applicants according to their test scores and to select only the highest test scorers for job placement" (*id.* at A-16).[8] Indeed, the court of appeals

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[7] The district court's determination that there was no constitutional violation was not challenged on appeal.

[8] Because *Davis* was distinguished in the manner indicated in the text, the court of appeals declined to decide whether

concurred (*id.* at A-21 & n.23) in the district court's finding that the tests were "inappropriate even for * * * determining whether an applicant has the minimum capacity to complete training" (*ibid.*) because a score of zero on the tests appeared to "predict passing academy averages" (*id.* at A-46).

The court of appeals declined petitioners' invitation to extend the *Davis* rationale to hold that *any* test can be validated on the basis of its relationship to training "without regard to the test's ability to predict job performance" (Pet. App. A-14), because "[s]uch an extension would violate the requirement of job performance validation enunciated in *Griggs* and *Albemarle*, as well as the agency guidelines elaborating upon that requirement" (*id.* at A-20; footnote omitted). The court held that ranking on the basis of entry level test scores was permissible only upon a showing that higher test scorers performed better on the job than lower test scorers (*id.* at A-21 to A-22), and that such evidence was "utterly lacking" here (*id.* at A-22). The court of appeals accordingly affirmed the district court's judgment that petitioner's use of the 10-B and 20-C tests violated Title VII.

The case was remanded for additional findings relating to the dates on which liability commenced. The court of appeals directed that petitioner Board should be held immune from liability, pursuant to Section 713(b) of Title VII,[9] during the period when

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the *Davis* standards applied to this, a Title VII case (*id.* at A-16 n.18).

[9] Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b) provides, in pertinent part:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful em-

its validation studies were being conducted only if it in good faith relied on and met the conditions for provisional use of tests provided in Section 1607.9 of the EEOC Guidelines (Pet. App. A-25 to A-27).[10]

ARGUMENT

The district court and court of appeals properly concluded that the tests at issue had not been shown to be job-related for Title VII purposes. The fact that high test scores correlated with high grades in the academy training programs was properly deemed insufficient for validation purposes absent a showing that the high test scores or high academy grades predicted better job performance. The soundness of this holding is underscored by the fact that in this case, "even extremely low test scores do not predict failure at the academies" (Pet. App. A-12). In light

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ployment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] * * *.

[10] Section 1607.9 of the EEOC Guidelines on Employment Selection Procedures, (29 C.F.R. (1970)) (Pet. App. A-180) provides:

> Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided*, (a) The person can cite substantial evidence of validity as described in § 1607.7(a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

of the concurrent findings of the two courts below on the invalidity of the tests (see *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948)), this case presents only a particular application of well-settled legal principles. The decision below is consistent with the decisions of this Court and those of other courts of appeals.

1. Petitioner does not dispute that the tests have a substantial disparate impact on black applicants. Where there is such an impact, Title VII prohibits the use of such a device absent a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). Petitioner nevertheless asserts that this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), permits an employer to validate a test for Title VII purposes by establishing a positive relationship between the test scores and a training program without regard to whether the test scores themselves have any relationship to job performance.

Washington v. *Davis*, of course, was not a Title VII case, and it is by no means clear that it applies in a Title VII context.[11] However, as the court of appeals properly concluded (Pet. App. A-16 n.18), that question is not presented because the holding in *Davis* is inapplicable here in any event.

The principal distinction is that the tests here were used for *ranking* as well as for *screening* of job ap-

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[11] See, *e.g.*, *Washington* v. *Davis*, *supra*, 426 U.S. at 255 (Stevens, J., concurring); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1378-1382 & n.17 (9th Cir. 1979), cert. denied, No. 79-54 (Apr. 28, 1980); *Guardians Association of the New York City Police Dep't, Inc.* v. *Civil Service Commission*, No. 79-7377 (2d Cir. July 25, 1980), slip op. 6087-6088.

plicants. In *Davis*, police recruits were in great demand, and all candidates who passed the exam were offered jobs. *Davis* v. *Washington*, 348 F. Supp. 15, 16 (D.D.C. 1972). Here, in marked contrast, only a small percentage of the hundreds of persons taking the tests were ultimately offered jobs. Thus, only 6.6% of black applicants and 33.3% of white applicants who took the 10-C test were hired, and only 3.2% of black and 14.1% of white applicants taking the 20-B test were hired (*ibid.*).

A further difference is that in *Davis* there was substantial evidence that those who failed the test would have been unable to complete the Recruit School successfully and, as a result, that there was a " 'direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training.' " 426 U.S. at 251 n.17. In other words, there was evidence in *Davis* that "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (U.S. Supp. App. 13)[12] and that persons with the lowest scores on Test 21 would probably have obtained failing grades in the recruit training program (*id.* at 16-17). By contrast, in this case, there is evidence that even those who failed the entry-level tests would have been able to complete academy training successfully (Pet. App. A-12, A-46). In any event, many applicants who received passing scores on the 10-C and 20-B tests, and thus, by petitioner's own standard, possessed the necessary qualifications to complete

[12] "U.S. Supp. App." refers to the United States Supplemental Appendix filed in the court of appeals in this case, a copy of which is being lodged with the Clerk.

training, were not offered jobs because eligibility lists for hiring were ranked in order of test scores.

For these reasons, the court of appeals properly declined to extend the *Davis* holding to this case "where the tests were not used to ascertain the minimum skills necessary to complete job-relevant training, but rather were used to rank job applicants according to their test scores and to select only the highest test scorers for job placement" (Pet. App. A-16). *Washington* v. *Davis* does not provide employers with a vehicle to dispense with the requirement mandated by this Court in *Griggs*, *supra*, and *Albemarle Paper Co.*, *supra*, that employee selection devices that impact adversely on blacks must be shown to have "a manifest relationship" to the jobs in question. "Such evidence is utterly lacking here" (*id.* at A-22).

The Fifth Circuit's holding in this case is consistent with those of other courts of appeals. *Guardians Association of the New York City Police Dep't, Inc.* v. *Civil Service Commission*, No. 79-7377 (2d Cir. July 25, 1980), presented a situation similar to this case. The plaintiffs were black and Hispanic police officers who had been laid off under a last-hired, first-fired policy. They challenged the validity under Title VII of Entry-level employment tests used, as in this case, to rank candidates according to test scores. As here, candidates were then hired in rank order. The use of the test as a screening device was not in issue in *Guardians*, because all of the plaintiffs had passed the test. "They challenge[d] only the use of their passing scores to determine the order in which they were offered employment" (slip op. 6089-6090). The Second Circuit concluded, as the Fifth Circuit did here, that even if *Washington* v. *Davis* applied to Title VII cases, "the *Washington* v. *Davis* argument—that the

entry-level tests were justified by the need to weed out those applicants who lacked the minimal skills necessary to successful completion of the training program —is simply not available to the defendants on this appeal" (*ibid.*). Similarly, in *FIRE* v. *City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), petition for cert. pending, No. 80-29, the Eighth Circuit held that a Fire Department promotion test used as a ranking device could be validated for Title VII purposes only by showing that the higher ranking test scorers made the better employees. 616 F.2d at 357-360.[13]

2. The lower courts properly required a showing of practical or operational significance for the use of the 10-C test, and the district court properly considered, among other factors, the degree of adverse impact of the 10-C test. Petitioner does not challenge, as such, the requirement that a showing of practical significance must be made under Title VII, but urges that it is not appropriate to balance a test's practical utility against its adverse impact (Pet. 16-20). Petitioner therefore suggests that this Court sanction a departure from the requirement of such a balancing determination, which is set forth in the Department of Justice Guidelines on Employee Selection Procedures, Section 12b(5), and the EEOC Guidelines on Employment Selection Procedures, Section 1607.14 B(6). However, this Court has ruled that the Guidelines, though not binding, are entitled to great deference. *Albemarle Paper Co., supra,* 422 U.S. at 431. The only exception or limitation to such deference is where "there are 'compelling indications' " (*Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973)) that

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[13] The test's relationship to a training program was not at issue in the St. Louis case.

the administrative interpretation is inconsistent with congressional intent. Petitioner has neither demonstrated any such compelling indications here nor otherwise suggested why the criteria used by the courts below are not both reasonable and appropriate in this context. Rather, petitioner's only objections are theoretical ones.

Petitioner hypothesizes that the Guidelines' requirement of considering a test's adverse impact in assessing its practical utility will have a chilling effect on affirmative action programs (Pet. 18-19). The suggestion is that such programs would attract a large number of minority applicants who are disproportionately unqualified when compared with those attracted to the jobs in the ordinary course of business and, thus, that an employment test used in such a circumstance might have a substantial adverse impact on minorities even though it is job-related. Whether, in some circumstances, this theory might have merit, it is not a valid basis for challenging the lower courts' decisions here, "[a]bsent * * * any hard data to support such an hypothesis or to indicate its magnitude" (Pet. App. A-33).[14]

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[14] Similarly, petitioner's additional contention that balancing adverse impact against practical utility may restrict the use of nationwide tests because adverse impact may differ from region to region (Pet. 19-20) is without a factual basis in this record.

CONCLUSION

The petitions for a writ of certiorari should be denied.[15]

Respectfully submitted.

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[15] Cross-petitioners argue that the court of appeals incorrectly interpreted Section 713(b) of Title VII to allow immunity for petitioner if it can establish that it in good faith relied on, and complied with, EEOC's guideline relating to the provisional use of tests.

This question does not merit the Court's review at this time for two reasons. First, as cross-petitioners note (Cross Pet. 10-11 n.7), the Employee Selection Procedure guidelines promulgated since 1976 make quite clear that employers are not immunized from liability for tests in use during the period in which validation studies are being conducted. The question thus arises only with respect to tests used prior to November 1976.

Second, the court of appeals' ruling may be of no practical significance even in this case. The Personnel Board may be unable to meet the court of appeals' requirement (Pet. App. A-25 to A-27) that it in good faith relied on Section 1607.9 or that it complied with its provisions—*i.e.*, that it had substantial evidence of the tests' validity and that its validation studies were designed to produce, within a reasonable time, the additional validation data required. If the Board cannot make such a showing, cross-petitioners are not injured, of course; if the Board does make the required showing, cross-petitioners will have an opportunity to seek this Court's review of the question at that time.

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